No. 1077

IN THE

United States Circuit Court of Appeals

FOR THE FOURTH CIRCUIT.

No. 5254

THE UNITED STATES OF AMERICA,
Libellant-Appellant,

vs.

OLD DOMINION PEANUT CORPORATION,
Claimant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

HONORABLE WILLIAM C. COLEMAN, DISTRICT JUDGE.

BRIEF FOR CLAIMANT-APPELLEE

RAYMOND M. HUDSON,
Washington, D. C.,
J. CHARLES FAGAN,
Baltimore, Maryland,
Attorneys for Claimant-Appellee.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. MEMMER, WASHINGTON REPRESENTATIVE,
TIMES BUILDING

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Statement of the Case.

The Government filed five libels which were consolidated alleging that certain peanutbutter and chocolate coated peanuts belonging to the Old Dominion Peanut Corporation, Claimant, which were seized in Maryland and North Carolina were adulterated under 21 USCA 342(a)(3) and (4).

The Government Inspector without any knowledge or information as to the condition of any of this peanutbutter and candy, unlawfully and illegally and in violation of the Food Act and the 4th and 5th Amendments of the Constitution, obtained by mis-representation and carried away certain peanutbutter at the claimant's plant in Norfolk, Virginia, and likewise illegally and unlawfully and in violation of the act and the 4th and 5th Amendments of the Constitution by misrepresentation obtained leave to copy shipping records of the claimant thus discovering the names and addresses of various of its customers. Claimant did

not knowingly consent to or permit the taking of the merchandise or copying of the records.

The lower court found that the action of the Inspector "smacks of surprise if not of actual misrepresentation" "did in fact mislead the factory owner" and the court then stated "there is reasonable ground to believe that the Government's position was misrepresented" by its agent and that he combined a factory inspection with a shipping record search.

Through the information thus illegally obtained, the Government without any information that merchandise seized under the libels was adulterated, filed these libels and seized said merchandise and the Government contends that the merchandise seized under the libels is adulterated. The facts are set out in the Claimant's Motion (R. 25) and in the accompanying Affidavit of its President, Edgar S. Stubbs (R. 29), and no counter affidavits were filed.

The exceptions (R.) filed to the motion are not sworn to and do not deny the allegations of the affidavit—only the Government is ready to disprove same.

But for said illegal seizures of samples and searches of the records and the copying of the latter, the Government would never have been able to make an analysis, or file these libels.

The peanuts and peanutbutter, unlawfully taken from the plant by Inspector Rankin, was not part of the same peanuts and peanutbutter afterwards seized under the libels nor were they manufactured from the same lot or shipments of peanuts.

The Court after taking of testimony (R. 33) made findings of fact and conclusions of law (Appt's. App. 5, 6) and

entered an order (R. 94) impounding the evidence and dismissing the five consolidated libels and the United States appealed.

POINT I.

The findings of fact by the Court in its opinion are fully sustained by the evidence.

The Court made rather complete findings of fact and stated its conclusions of law thereon in its opinion (R. ; 54 F. Supp. 641) and when the Court thus makes findings in its opinion, it is sufficient compliance with F. R. C. P. 52; Roberts vs. Calhoun Co., 45 F. Supp. 291 (Fla.); Klimkiewicz vs. W. D. & T. Co., 74 Apps. D. C. 333; 152 F. (2d) 957. This Court in Knapp vs. Imperial, etc. Co., 130 F. (2d) 1 (CCA—4), went nearly as far as the Klimkiewicz case and it cited some of the D. C. decisions cited in the Klimkiewicz case.

The Court in the opinion found as facts:

That there was not a full and complete disclosure by the Inspector as to the purpose for which the shipping records of the claimant were sought—not the precise purpose (Appellant's App. 5).

That the information so obtained from such examination of the shipping records "was made the basis of these proceedings, and is the *only* basis for them." That smacks of surprise if not actual misrepresentation. That it is not a permissible way for the government to proceed. That "there is reasonable ground to believe that the Government's position was misrepresented."

That the Inspector combined a factory inspection with an examination of claimant's records, which "did in fact

mislead the factory owner''—the claimant—as to just what use would be made of the shipping data gleaned from these records.

That the government did not obtain, or seek to obtain the data on which these proceedings are based from the carriers under 21 USCA 373.

As conclusions of law, the Court said in part:

> *''I rest my decision upon what I believe to be the proper Interpretation of the Act as applied to the particular facts as I find them from the weight of the credible evidence.''*
>
> * * * * *
>
> ''Yet, for aught that appears, there is *reasonable ground to believe* that the *Government's position was misrepresented;* and, in any event, where the Act says that investigators, *before starting libel* proceedings based upon interstate shipments shall *obtain records in a certain way,* they should *either proceed accordingly, or should make complete disclosure to the factory owner* or operator and be sure that his consent to examination of his records is not due in any respect to a failure to understand the full use to which the records might be put.'' (Appt's. App. p. 6; 54 Fed. Supp. at 642.)

Mr. Stubbs, President of the claimant whom the Court in its opinion said was a very frank witness, testified that ''I was led to believe. I thought, he being an officer that he had a perfect right to'' inspect the records (App'ts. App. 9, 10).

On cross-examination Stubbs testified:

> ''Q. He ask you whether you would permit an examination?
>
> A. No, he asked for them. He didn't ask whether I would permit it or not.''

He also testified on cross-examination:

> ''Q. You speak about what you do not know then and what you know now. Will you explain that? You

say you have been advised since. Do you mean you have been advised by your present counsel, Mr. Hudson?

A. I have been advised not only by my present counsel, but I have been advised by other sources since this thing came up, that I had certain rights that I could have gone into then, objected to it."

Mr. Stubbs further testified that he and his partner demurred as to the right of the inspector to examine the records (Appt's. App. 9).

Mr. Stubbs (R. , Tr. 17, 18) testified that the Inspector took samples in his presence under the same conditions that he had inspected the plant and that he Stubbs did not know his rights and that the Inspector did not pay for the samples as he would not permit it for it was for the government and he understood the government was entitled to demand and take the samples and that as a producer he could not sell to a consumer (R. , Tr. 27).

Other testimony of Stubbs in Appellant's Affidavit 8, 9, 10 and more in the record and the undenied facts in his affidavit (R.) taken with Inspector Rankin's admissions are sufficient to sustain the findings of the Court. Where Rankin contradicts Stubbs the Court's findings are conclusive as the Court heard the witnesses and saw their demeanor.

POINT II.

(A) The courts will not permit the United States to accept the benefits of, or condone, the acts of its agents not consistent with good faith, not authorized by law, or "that smack of surprise if not actual misrepresentation," and which "did in fact mislead" and caused reasonable ground to believe that the government's position was misrepresented by its agent.

(B) The above action of the government's agents followed immediately by the filing of five libels in different states against a nationally known producer were so arbitrary, unreasonable and unlawful as to amount to the lack of due process of law requiring the dismissal of the five libels.

As counsel remembers, although he is unable now to find the citation the Supreme Court has stated that the United States can not do any wrong. It is in practically those words. This is based on the old principle that the Crown can do no wrong.

It is the function of the Courts to prevent the government from receiving advantage from, or condoning, such wrongful acts of its agents.

The brief of the appellant contends to the contrary and for the use of the evidence obtained by such wrongful methods. But we do not think the citations are applicable.

The lower Court in the instant case found that the action of the Inspector "smacks of surprise if not of actual misrepresentation" "did in fact mislead the factory owner" and the Court then stated "there is reasonable ground to believe that the Government's position was misrepresented" by its agent.

Rankin's statements to Stubbs have all of the vice of half truths.

As Dr. E. T. Thompson of Union Theological Seminary recently quoted Dr. James H. Snowden:

> "We are all expert in arranging and coloring facts, so as to make them look like and pass for truth, however wrong our words may be. But a half-truth may in effect be a whole lie and involves us in all the guilt of falsehood."

Judge Coleman listened to and watched the expression and demeanor of Rankin and Stubbs and he found as a fact that "the Government's position was misrepresented."

This in effect was a finding that Rankin's half truths were in effect whole lies and falsehoods.

In the McNabb case (quoted herein p. 13) the Court says:

> "Implies the duty of establishing and maintaining civilized standards of procedure and evidence."

In U. S. vs. Taylor, 104 U. S. 216 at 221; 26 L. ed. 721 at 723 the Court said:

> "A construction should be given to these statutes which would be consistent with *good faith* on the part of the *United States.*"

In Direction Disconto-Gesill-Schaft vs. U. S. Steel Corp., 267 U. S. 22 at 28, 45 Sup. Ct. 207; 69 L. Ed. 495 at 498 the Court said:

> "But it (the U. S.) prefers to consider itself civilized and to act accordingly."

Bourdeau vs. McDowell, 256 U. S. 465 at 477, 65 L. Ed. 1148 at 1151, Mr. Justice Brandies, dissenting with Mr. Justice Holmes had occasion to use this pregnant thought, which we respectfully submit, applies in this case:

> "Respect for the law will not be advanced by resorting in its enforcement to means which *shock a common man's sense of decency and fair play.*"

In Shafer & Co. vs. Farmers & Co., 268 U. S. 189 at 202, 45 Sup. Ct. 481; 69 L. ed. 909 at 916 to the contention that the existing evils justified the Act Mr. Justice Van Devanter said:

> "The answer is that there can be no justification for the exercise of a power that is not possessed."

In Am. Bank & Trust Co. vs. Federal Reserve Bank, 256 U. S. 350, 41 Sup. Ct. 499 at 500; 65 L. Ed. 983 at 990 Mr. Justice Holmes said:

> "The policy of the Federal Reserve Bank is governed by the policy of the United States with regard to them and to these relatively feeble competitors. We do not need aid from the debates upon the statute under which the reserve banks exist to assume that the United States did not intend by that statute to sanction this sort of warfare upon legitimate creations of the states."

The secretary by permitting others to do a wrong makes the United States a party to the wrongdoing under the principle announced in Warner Co. vs. Eli Lilly & Co., 265 U. S. 526, 44 Sup. Ct. 615 at 616, 68 L. ed. 1161 at 1164; Hostetter Co. vs. Brueggeman-Reinert Co., 46 Fed. 188 at 189, and Idaho In. Co. vs. Gooding, 265 U. S. 518, 45 Sup. Ct. 618 at 621; 68 L. Ed. 1157.

In Behn Meyer Co., Ltd. vs. Miller, 266 U. S. 457, 45 Sup. Ct. at 168, 69 L. Ed. 374 at 387-8:

> "The contrary view, urged by appellees, would greatly qualify, perhaps delete, this subsection, and would place the United States in the unenviable position of positively refusing, after hostilities had ended, to give up property which had been taken contrary to their own laws. It would require very clear words to convince us that Congress intended any such thing."

The Olmstead case (277 U. S. 438, 72 L. ed. 944) cited by the appellant was overruled or overcome by the act of congress as shown in the first Nardone case (302 U. S. 379, 82 L. ed. 314 at 316).

It will be noted that the Court construed the statute in the first Nardone case so as to prevent methods inconsistent with ethical standards and personal liberty for the Court said at pages 383 and 316:

> "It is urged that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed *inconsistent with ethical standards and destructive* of personal liberty. The same considerations may well have moved the Congress to adopt Sect. 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution."

The Court carried the principle further in the second Nardone case (308 U. S. 388 at 340, 84 L. Ed. 307 at 3011), where the Court said:

> "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution *or the law of the land.* In a problem such as that before us now, two opposing concerns must be harmonized: on the one hand, the stern enforcement of the criminal law; on the other, protection of that realm of privacy left free by Constitution and laws but capable of infringement either through zeal or design. In accommodating both these concerns, meaning must be given to what Congress has written, even if not in explicit language, so as to effectuate the policy which Congress has formulated.

> We are dealing with specific prohibition of particular methods in obtaining evidence. The result of the holding below is to reduce the scope of Section 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of Section 605 *would largely stultify the policy which compelled our decision in* Nardone v. United States, *supra.* That decision was not the product of a merely meticulous reading of technical language. *It was the translation into practicality of broad considerations of morality and public well-being.* This Court found that the logically relevant proof which *Congress* had outlawed, it outlawed because '*inconsistent with ethical standards and destructive of personal liberty.*' 302 U. S. 379, 384, 82 L. ed. 314, 317, 58 S. Ct. 275. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed '*inconsistent with ethical standards and destructive of personal liberty.*' What was said in a different context in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392, 64 L. ed. 319, 321, 40 S. Ct. 182, 24 ALR 1426, is pertinent here: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.' "
>
> * * * * *
>
> "The *civilized conduct* of criminal trials *cannot be confined within mechanical rules.* It *necessarily demands the authority of limited direction entrusted to the judge* presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here indicated, *rely on the learning, good sense, fairness and courage of federal trial judges.*"

The unlawful taking of samples by Rankin is as fatal to the Government as such examination of records and requires that the judgment be affirmed. While the lower Court

only mentioned records its findings as to misrepresentations and lack of voluntary consent are equally applicable under the evidence to the taking of the samples by the Inspector.

(B) THE ABOVE ACTIONS OF THE GOVERNMENT AGENTS FOLLOWED IMMEDIATELY BY THE FILING OF FIVE LIBELS IN DIFFERENT STATES AGAINST A NATIONALLY KNOWN PRODUCER WERE SO ARBITRARY, UNREASONABLE AND UNLAWFUL AS TO AMOUNT TO THE LACK OF DUE PROCESS OF LAW REQUIRING THE DISMISSAL OF THE FIVE LIBELS.

In National Remedy Co. vs. Hyde, Secretary, 60 Apps. D. C. 252, 254; 50 F. (2d) 1066 the Secretary of Agriculture was enjoined from making "multiple" seizures of appellant's remedy because the institution of numerous libels and seizure of plaintiffs' remedy constituted arbitrary exercise of power and *deprivation of due process of law,* because under averments of plaintiff's bill the effect thereof would be to deprive plaintiff of its property through destruction of its business before issues involved could be determined by Court, and facts did not show such drastic remedy was necessary to protect public prior to determination of Court.

No appeal was filed. The Court said:

> "Inasmuch as every district attorney to whom the department makes certification must institute appropriate proceedings, by indictment or libel for condemnation, or both, it is evident that, even though the findings of the Department are merely administrative, nevertheless, if such certification should be made to the district attorney in every district where a product might be found, the manufacturer would be crippled

or ruined long before the final adjudication in the court could be had. Such a result, we think, was not contemplated by Congress, except possibly in unusual cases where drastic action would be necessary for the immediate protection of the public. Is this a case of that character? We think not."

The situation in the case at bar shows that the entire proceedings have been arbitrary, unreasonable and without due process of law. The Government Agent Rankin illegally took samples of peanutbutter from the plant, which samples were no part of the merchandise afterwards seized under the libels and they arbitrarily and unlawfully assumed that that illegally obtained peanutbutter was the same as the peanutbutter seized under the libels. The same is true as to the peanuts Rankin seized and the chocolate coated peanuts seized under the libels. The evidence indicates that the peanuts and peanutbutter that Rankin took, certainly the peanuts, were not marketable merchandise. The only knowledge that the Government Agent had of the shipments that were seized under the libels was obtained from the illegal searching and copying of the records of the claimant. The lower Court so found.

When the libels were issued and seizures made, the Government Agents had absolutely no knowledge that any part of the seized goods was adulterated and we deny that it is adulterated. Such action is condemned by the Nueslein Case (page 39 below). Here is an instance where the Government Agents in a desire to make a record have arbitrarily and unreasonably attacked a large nationally-known producer and carried it to the extent of endeavoring to destroy its business by filing five libels in two different states.

The claimant has been in business many years and has done a large business with the United States Government

and various state governments. In 1942 it sold to the United States Government 12,000 to 15,000 cases of peanut-butter on samples and there was no complaint or rejection. In 1943 it sold the United States Government 25,000 cases on sample and only one small order was rejected on the samples but was not condemned nor termed by the Government as adulterated. In 1942 and 1943 it sold the State of Pennsylvania on samples 1,000 cases each year. It likewise sold 1,000 cases each year to New Jersey, whose pure food laws are very strict. It sold similar amounts each year to Connecticut and Virginia. It sold North Carolina 2,000 cases each year. There were no complaints or rejections by any of these states.

In McNabb vs. U. S. 318 U. S. 332 .... at 340 87 L. Ed. .... at .... the Court said:

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as '*due process of law*' and below which we reach what is really trial by force."

POINT III.

When Congress provides one method for federal agencies to obtain information for enforcing the statute it thereby excludes all other doubtful, questionable, unconstitutional and unethical methods.

Title 21 U.S.C. 373 provides a sufficient and the only legal method of obtaining such information under the Food and Drug Act.

Last December Judge Pierson Hall in the United States District Court at Los Angeles in Prentis Brown OPA vs. Glick Brothers Lumber Company, 52 F. Supp. 913 at 914 held a somewhat similar copying of records under the OPA Act was unlawful, contrary to the statute and must be returned. In the opinion Judge Hall said:

> "I am mindful of the arguments that were made by the Government of the necessity for maintaining all of the guards against inflation; but at the same time I cannot escape the thought that the Bill of Rights was written into the Constitution of the United States by men who had just fought a war. They themselves had completed fighting the war of the Revolution, and drafted the Constitution and wrote the Bill of Rights. I think that they were just as conscious of the necessity for winning wars as we are today. Moreover, I think that they had actual experience in winning one, and saw the necessity for preserving the rights which they delineated in the Constitution and the Bill of Rights, and still have the capacity to win wars without destroying those rights.
>
> I think the OPA has no right, either in a civil case or a criminal case, * * * that is to say, in anticipation of either one or the other—to go into a man's place of business, or his home, and there examine or take from him records of his business or his personal records. In granting this motion to suppress the evidence we are not cutting off the hands of the OPA from enforcing the law. They can still enforce the law. They can enforce it in the way Congress said they could enforce it. They can get the evidence by subpoena. They can get it in the way that every other case has to be prosecuted by the Government when it is prosecuted under the terms and limits of the Constitution. So that in making this ruling there is no striking down of the OPA, or the efforts of the Government to prevent inflation, or the declared policy of Congress. On the contrary, it is my belief that I am carrying out the express will of Congress and the determination of the whole people that the rights which are part of our liberties and freedom shall be preserved against any and every agency of the Government."

Section 703 of the Food and Drug Act of June 25, 1938; 21 USCA 373 first came into the Code in 1938.

21 USCA 373 as far as material provides as follows:

> "Section 373. *Records of interstate Shipment.* For the purpose of enforcing the provisions of this chapter, *carriers engaged in interstate commerce, and persons receiving food,* drugs and devices, or cosmetics in *interstate commerce* or holding such articles so received, shall, *upon the request of an officer or employee duly designated by the Administrator,* permit such officer or employee, at reasonable times, to have access to and to copy all records showing the movement in interstate commerce of any good, drug, device, or cosmetic, or the holding thereof during or after such movement, and the quantity, shipper, and consignee thereof."

That is the only section any where allowing an inspection of records and it restricts inspection of records to the records of interstate carriers.

Judge Coleman held that this restricted the inspection of records to the ones set out in the section.

21 USCA 374 is the section providing for inspection of the plant or factory. It is a new section and is as follows:

> "Section 374. *Factory Inspection.* For purposes of enforcement of this chapter, officers or employees duly designated by the *Administrator, after first making request and obtaining permission* of the owner, operator, or custodian thereof, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to *inspect* at reasonable times, such factory, warehouse, establishment, or vehicle and all pertinent equipment."

Judge Coleman held that the Inspector was admitted for an inspection of the factory under 21 USCA 374 and then

combined it after his entrance into the factory with an unlawful inspection of the shipping records of the claimant. If either Sections 373 or 374 authorized the inspection of the records that the inspector made then to that extent each of the sections is unconstitutional.

Clearly Congress did not intend to grant such authority. Congress knew by a former decision of the Supreme Court in 1885 that the attempted grant of such authority would be unconstitutional.

In Boyd vs. U. S., 116 U. S. 616 at 630, 29 L. ed. 746 at 751 held the act of June 22, 1874, giving the Court authority on the motion of the government attorney to require the claimant to produce in Court his private books, invoices and papers or else the allegations of the attorney to be taken as confessed, held to be unconstitutional and void as applied to suits for penalty or to establish a forfeiture for party's goods as being repugnant to the 4th and 5th Amendment and the Court said:

> "All the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively on motion to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default." (*Note:* Sixty-two years later a similar act was passed in England, viz.: the Act of 14 and 15 Vict. Chap. 99, Section 6. See Pollock, Power of Courts to Compel Production of Documents, 5.)

"The *restriction of this proceeding to 'cases and under circumstances where they (the parties) might be compelled to produce the same (books or writings) by the ordinary rules of proceeding in chancery'* shows the wisdom of the Congress of 1789. The court of chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose, in the endeavor to fix upon such as would best secure the ends of justice. To go beyond the point to which that court had gone may well have been thought hazardous. Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. *(Note:* See Pollock, Production of Documents, 27, 77 Law Lib.) And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. *It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.*"

The Senate Report 5 of the 74th Congress referring to Section 14 of the bill which became section 703 of the act said:

"Section 14 would authorize officers and employees duly designated by the Secretary of Agriculture to inspect and copy the records of *shippers, dealers, and interstate carriers,* pertaining to the shipment or sale of food, drugs or cosmetics in interstate commerce. This is another implementing provision necessary for effective enforcement since proof of interstate shipment without such records is frequently impossible."

It will be noted that Congress left out of the Act the words "shippers" and "dealers" most likely because of the Boyd decision, but the Government is now asking the Court by construction to legislate and put the words back into the Act.

House Report 2139 of 75th Congress says as to Sect. 703 (21 USCA 373) of the Act as to carrier's records.

> "Section 703 requires *interstate carriers* and *receivers* to permit access to and the copying of all necessary records to show interstate shipment and thus establish Federal jurisdiction. This provision is necessary since some warehousemen and trucking concerns and even some railroads have refused to permit the copying of records which were essential to the institution of proceedings to control abuses of consumer health and welfare. The absence of such provision in the present law has been a definite handicap to its enforcement."

The Senate report also stated that the procurement of the data from the records of the carriers was necessary to prove jurisdiction.

Counsel was unable to find any discussion in either the House or Senate of this section or of the following Sect. 704, authorizing factory inspection.

Senate Report 5 of 74th Congress referring to Factory Inspection under sect. 704 of the act says:

> "Authority to inspect premises is usually regarded as an indispensable implement for the enforcement of statutes enacted for the protection of the public health. This assertion is borne out by the fact that state laws and municipal ordinances, generally confer such authority upon local, health, food and drug officials and in some instances go so far as to authorize the summary destruction of food or drugs by such officials without affording a right of review, whenever such food or drugs are inimical to public health".

A later Senate report discussing this section of the act says:

> "Authority for such inspection is an indispensable implement for the enforcement of any statute intended to protect public health. Many of the provisions of this bill, particularly those dealing with *filth and insanitary conditions*, could not be otherwise effectively applied.

> While one of the great weaknesses of the present food and drug act is the absence of any provision of this kind, it has been found that most manufacturers welcome inspection by Federal officials. Experience has shown that the relatively small minority who refuse permission for inspection in almost every instance are undertaking to hide some reprehensible condition."

House Report 2139 of 75th Congress states as to Sect. 704 (21 USCA 374) of the Act as to Factory Inspection:

> "Section 704 provides for the inspection of factories doing an interstate business. While no such provision is in the present law, perhaps more than 95 percent of food and drug manufacturers have invariably given permission to inspect. It is only through factory inspection that certain abuses of consumer welfare can be established. A notable illustration of this is insanitary manufacturing conditions."

These reports make it clear that the Congress never intended by this section 704 to authorize an inspection of a manufacturer's records.

Such a construction of the section would make it unconstitutional under the Boyd decision.

As Section 373 names the inspection of carrier's records and does not name claimant's records, it clearly excludes claimant's records under the well-known principle that naming one excludes the other. On the same principle, Section 374 by naming factory inspection and not naming record inspection excludes record inspection.

If either action provided for inspection of the claimant's record, it would clearly be unconstitutional under the Boyd case above.

Judge Coleman was absolutely right in holding that neither section authorized inspection of the claimant's records and that they should be so construed as to limit

Government inspection to the inspection of carrier's records.

An unconstitutional search cannot be made valid by a statute. Nathanson Case, 290 U. S. at 46; 78 L. Ed. 159 at 161 where the Court held and said:

> "Here, we are dealing with a warrant to search a private dwelling said *to have authorized by the Tariff Act*. It went upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts.
>
> All unreasonable searches and seizures are absolutely forbidden by the Fourth Amendment. In some circumstances a public officer may make a lawful seizure without a warrant, in others he may act only under permission of one. In the present case the place of search and seizure was a private dwelling. The challenged warrant is said to constitute adequate authority therefor. The legality of the seizure depends upon its sufficiency. Did it issue upon probable cause supported by oath or affirmation within the intendment of the Amendment?
>
> The Amendment applies to warrants under any statute; revenue, tariff, and all others. *No warrant inhibited by it can be made effective by an act of Congress or otherwise.*
>
> It is argued that searches for goods smuggled into the United States in fraud of the revenue, based upon affidavits of suspicion or belief, have been sustained from the earliest times; that this practice was authorized by the Revenue Act of July 30, 1789, 1 Stat. at L. 43 chap. 5, also subsequent like enactments. But we think nothing in these statutes indicates that a warrant to search a private dwelling may rest upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances."

The statutes must be so construed as to preserve the constitutional rights. Grau case, 287 U. S. 124 at 128; 77 L. Ed. 212 at 215, where the Court said:

"The broad construction of the act by the Court of Appeals unduly narrows the guaranties of the 4th Amendment, in consonance with which the statute was passed. Those guaranties are to be liberally construed to prevent impairment of the protection extended. Boyd v. United States, 116 U. S. 616, 635, 29 L. ed. 746, 751, 6 S. Ct. 524; Gouled v. United States, 255 U. S. 298, 304, 65 L. ed. 647, 650 41 S. Ct. 261; Go-Bart Importing Co. v. United States, 282 U. S. 344, 357, 75 L. ed. 374, 382, 51 S. Ct. 153. Congress intended, in adopting Sect. 25 of title II, of the National Prohibition Act, to preserve, not to encroach upon, the citizen's right to be immune from unreasonable searches and seizures, and *we should so construe the legislation as to effect that purpose.*"

The instant case is as strong as and is sustained by the Nueslein case (quoted herein page 39). In the Nueslein case where officers investigating an automobile collision, finding the door of the defendant's residence open, walked in and went up stairs and found the defendant in the bathroom. When they ask him if he had been in an automobile accident he voluntarily admitted he had. The officers, believing that he had been drinking—he had drunk a bottle of beer—arrested him on the charge of driving while under the influence of liquor. Judge Gromer in holding that Nueslein's admissions were not admissible in evidence said:

"He may never have heard of the IVth Amendment. Undoubtedly, he had even less of an idea as to the method that would insure its continuing protection. He was *not* a bootlegger or a gambler schooled in resistance to law. *He probably had the average layman's respect for the common symbol of the law, officers in uniform.* It is *for* the *courts to protect such men's constitutional rights, not* for the courts to *study* the *finesse* by which persons *preserve their protection.* On this record we cannot say that the defendant *waived the infringement* of the IVth Amendment rights."

In the Woods case the Court *held a plea of guilty on arraignment does not constitute a "waiver" of privilege against self-incrimination* and the withdrawal of the plea of guilty on arraignment does not convert it into a waiver of the privilege. (75 U. S. Apps. D. C. 274, 287; 128 F. (2d) 265 cost denied.)

Judge Ruthledge (now of the Supreme Court) in reversing the judgment below said:

> "It is sufficient to rule that when, as here, the accused is without counsel and does not *appear clearly that he knows his rights and intends to waive them,* the 'plea' or its substantial equivalent, made without warning or advice, cannot be received in evidence against him. Any other rule would make of the hearing a *trap* and inquisition, with *consequences for the accused* and for the *judicial system not tolerable under the Constitution.*"
>
> * * * * *
>
> "*With world events running as they have been, there is special reason at this time for not relaxing the old personal freedoms won, as this one was through centuries of struggle.* Men now in concentration camps could speak of the value of such a privilege if were or had been theirs. There is in it the wisdom of centuries if not of decades.
>
> Large in this is a sense of fairness to the person accused, a respect for his individual integrity in accusation or even in guilt. But larger still in the sense of the Court's own part in justice and its administration. By this we mean the sense of the citizen as well as of the Court itself. It *cannot* be *partner or partisan* with the *prosecutor,* subtly or otherwise and *retain the confidence of the accused and the public or its own self-respect.*"

In the case at bar the copying of the record was certainly a subterfuge. The inspector combined an inspection of the factory with an examination of the shipping records of the claimant, which examination the lower Court found

as a fact was accomplished by the Inspector misleading the claimant, if not actually misrepresenting the situation to the claimant, and that the Inspector misrepresented the Government's position. This practice condemned by Judge Coleman is sustained by former decisions of this Court for in Paper vs. U. S. 53 F. (2d) 184 (CCA-4) Judge Parker for the Court said:

> "And all cases of unlawful search will be found to involve either this element or some *element of fraud or subterfuge*, as where an arrest is made a pretext for a search, or where the right to search having been obtained ostensibly for one purpose is used in reality for another. Henderson v. U. S., (C.C.A. 4th) 12 F. (2d) 528, 51 A.L.R. 420; Thompson v. U. S. (C.C.A. 4th) 22 F. (2d) 134."

This Court in Benton vs. U. S., 70 F. (2d) 24 at 26 CCA-4 (cert. denied) required strict construction of the statute as Judge Northcott said:

> "It is settled beyond controversy that any statutory requirements with respect to the search of a private dwelling must, under the Fourth Amendment to the Constitution of the United States, be strictly adhered to, and such statutes must be strictly construed. A study of the search warrant in this case leads to the conclusion that it fulfills all of the requirements of this rule of construction and of the statutes."

In U. S. vs. Di Corvo, 37 F. (2d) 124 at 132 (D. C. Conn.) Judge Thomas states that the best rule is to resolve any Court in favor of the defendant and quotes the Byars case and the Boyd case to sustain it. He says:

> "I admit that the question is *by no means free from doubt*, but my conclusion is that, in a matter of doubt, it is *better to uphold the Constitutional immunities than* to be keen to discover a basis for *circumventing* them.
>
> I think the language of the Supreme Court in Byars, Petitioner, v. United States, 273 U. S. 28, 47 S. Ct.

248, 250, 71 L. Ed. 520 decided on January 3, 1927, embodies the spirit which should guide federal courts in judging in any doubtful case involving in judging in any doubtful case involving the application of the Bill of Rights. The court there said: 'The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.'

Or, as Justice Bradley said in Boyd v. United States, 116 U. S. 616, at page 635, 6 S. Ct. 524, 535, 29 L. Ed. 746: 'It is the *duty* of *courts* to *be watchful* for the *constitutional rights* of the citizen, and *against* any *stealthy encroachments* thereon. Their motto should be *obsta principiis.*' ''

In U. S. vs. Mitchneck, 2 F. Supp. 225 at 226 (D.C.M.D. Pa.) The Court held and said:

"A search and seizure following an entry into a house of a person suspected of crime, by means of fraud, stealth, social acquaintance, or under the guise of a business call, are unreasonable and violate the Fourth Amendment. Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L.R.A. 1915B, 834, Ann. Cas. 1915 C, 1177. That which the agents saw they had no right to see, and, because it was illegally seen, they had no right to use it as the probable cause to secure a search warrant. 'The government may not make an entry by *means of false representations*, search as fully as possible without arousing suspicion, and later make the fruit of that entry and search the basis of what otherwise might be a legal search and seizure. *When it appropriates the benefits, it must bear the burdens, of its own illegal acts.* The grafting of the original entry and illegal search upon the later search and seizure did not cure what was unlawful in the first entry and search, but on the contrary, made the whole unlawful. This search and seizure growing out of the false entry

was an invasion of the indefeasible right of the personal liberty and private property of the appellants (defendant) and a violation of the Fourth Amendment'. Fraternal Order of Eagles, No. 778, Johnston Pa. *et al.* v. United States (C.C.A.) 57 F. (2d) 93, 94."

POINT IV.

The 4th and 5th Amendments of the Constitution protect persons and corporations against unlawful and illegal searches and seizures in libel actions under the food and drug act.

This principle is clearly established and sustained in the Boyd Case, 116 U. S. 616; at 630 29 L. Ed. 746 at 751, where the Court held and said in the head note prepared by Mr. Justice Bradley and in the opinion are as follows:

"1. The fifth section of the act of June 22, 1874, entitled 'An Act to Amend the Customs Revenue Laws' etc. which section authorizes a court of the United States, in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices and papers, or else the allegations of the attorney to be taken as confessed, *held to be unconstitutional and void as applied to suits* for penalties, or to *establish a forfeiture* of the *party's goods,* as being *repugnant* to the *Fourth* and *Fifth Amendments* of the Constitution.

2. Where proceedings were *in rem* to establish a forfeiture of certain goods alleged to have been fraudulently imported without paying the duties thereon, pursuant to the 12th section of said Act, held that an order of the court made under said 5th section, requiring the claimants of the goods to produce a certain invoice in court for the inspection of the government attorney, and to be offered in evidence by the attorney, and its admission in evidence, were erroneous and unconstitutional proceedings.

3. It does not require actual entry upon premises and search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the Fourth Amendment. A compulsory production of a party's private books and papers to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the Amendment.

4. It is equivalent to a compulsory production of papers, to make the nonproduction of them a confession of the allegations which it is pretended they will prove.

5. A *proceeding to forfeit a person's goods* for an *offense against the laws,* though *civil in form,* and whether *in rem or in personam,* is a *criminal case within* the meaning of that part of the *Fifth Amendment* which declares that no person 'shall be compelled, in any criminal case, to be a witness against himself.'

6. The seizure or *compulsory production* of a man's *private papers* to be used in evidence against him is *equivalent* to *compelling* him to be a *witness against himself;* and in a prosecution for crime, penalty or *forfeiture is equally within* the prohibition of the *Fifth Amendment.*

7. Both Amendments relate to the personal security of the citizen. They nearly run into and mutually throw light upon each other. When the thing forbidden in the Fifth Amendment, namely; compelling a man to be a witness against himself, is the object of a search and seizure of his private papers, it is an 'unreasonable search and seizure' within the Fourth Amendment.

8. Search and seizure of a man's private papers to be used in evidence for the purpose of convicting him of a crime, recovering a penalty, or of forfeiting his property, is totally different from the search and seizure of stolen goods, dutiable articles on which the duties have not been paid, and the like, which rightfully belong to the custody of the law.

9. Constitutional provisions for the security of person and property should be liberally construed."

The Court after quoting largely from the English case of Entick v. Carrington said:

"Can we doubt that when the Fourth and Fifth Amendments of the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the seizures, and as furnishing the true criteria of the reasonable and unreasonable character of those Amendments, in the light of Lord Camden's opinion, have put their hands to a law like those of March 3, 1863, and March 2, 1867, before recited? If they could not, would they have approved the fifth section of the Act of June 22, 1874, which was adopted as a substitute for the previous laws? It seems to us that the question cannot admit of a doubt. They would never have approved of them. The struggles against arbitrary power, in which they would have been too deeply engaged for more than twenty years, would have been too deeply engraved in their memories to allow them to approve of such insidious disguises of the old grievance which they had so deeply abhorred."

Again at page 634 the Court said:

"We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be *civil in form, are in their nature criminal.* In this very case, the ground of forfeiture as declared in the twelfth section of the Act of 1874, on which the information is based consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute; and it is declared that the offender shall be fined not exceeding $5,000, nor less than $50, or be imprisoned not exceeding two years, or both; and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods

could have been included in the judgment. If the government prosecutor elects to waive an indictment and to file a civil information against the claimants (that is, civil in form) can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. *The information, though technically a civil proceeding, is in substance and effect a criminal one.* As showing the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of Coffey v. U. S., in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods arising upon the same acts. *As, therefore, suits for penalties and forfeitures,* incurred by the commission of offenses against the law, are of *this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of* that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of the opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution; and is the equivalent of search and seizure, and an unreasonable search and seizure, within the meaning of the Fourth Amendment. Though the proceeding in question is devested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practice get their first footing in that way, namely; by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and liberal construction deprives them of half

their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

In the case of the United States vs. 8 packages, etc., of drugs, 5 F. 2nd 971, Judge Hollister in a strong opinion quoting part of the above quotation from the Boyd case, held that the Fourth Amendment was applicable to libels under the Food and Drug Act.

The case cited by the appellant of United States vs. 935 cases, etc., tomato puree, 136 F. (2d) 523, (CCA—6), makes a rather weak differentiation from the Boyd case and fails to mention that the Boyd case held a statute requiring the production and examination of records unconstitutional.

In Hepner vs. 213 United States, 103 at 111, 53 Law ed. 720 at 723 Mr. Justice Harlan said:

"The defendant insists that the case of Lees v. United States, 150 U. S. 476, 480, 37 L. ed. 1150, 1151, 14 Sup. Ct. Rep. 163, is an authority in his favor. This view cannot be sustained. That case was a civil action to recover a penalty for importing an alien into the United States to perform labor, in violation of the act of February 26th, 1885; 23 Stat. at L. 332, chap. 164, U. S. Comp. Stat. 1801, p. 1290. In that case the trial court compelled one of the defendants to testify for the United States and furnish evidence against himself. This court held that that could not be done; saying that 'this, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself,'—meaning thereby only that the action was of such a criminal nature as to prevent the use of depositions. Among the authorities cited in the Lees Case was Boyd v. United States, 116 U. S. 616, 634, 39 L. ed. 746, 752, 6 Sup. Ct. Rep. 524. In the latter case it was adjudged that penalties and forfeitures incurred by the commis-

> sion of offenses against the law are of such a quasi-criminal nature that they come within the reason of criminal proceedings for the purposes of the 4th Amendment of the Constitution and of that part of the 5th Amendment declaring that no person shall be compelled in any criminal case to be a witness against himself.
>
> So that the Lees and Boyd Cases do not modify or disturb but recognize the general rule that penalties may be recovered by civil actions, although such actions may be so far criminal in their nature that the defendant cannot be compelled to testify against himself in such actions in respect to any matters involving, or that may involve, his being guilty of a criminal offense. Those cases do not negative the proposition that the court may direct a verdict for the plaintiff in a civil action to recover statutory penalties of forfeitures, if the evidence is 'undisputed' that the defendant, by his acts, incurred the penalty for the offense out of which the civil cause of action arises.''

Appellant's strained construction of the Boyd case (Brief p. 8) is without merit as the present act like the one involved in that case provides that an offender may be fined and imprisoned and in addition the merchandise may be condemned and forfeited. Furthermore officers of a guilty corporation may be also fined and imprisoned.

The provision that in some instances the merchandise may under a guarantee be released, not to be sold, but to be worked over to be made healthy, if possible, does not differentiate the present act from the act in the Boyd case.

This is shown by an examination of the various applicable sections of the Food Act.

21 USCA 11 is the section where if the secretary reports to the District Attorney he must prosecute.

21 USCA 12 provides prosecution by the District Attorney.

21 USCA 2 provides the criminal penalties.

21 USCA 14 provides for a libel and condemnation.

21 USCA 331 (a) to (d) prohibits introduction of adulterated food into interstate commerce.

21 USCA 331 (e) prohibits the refusal to permit the copying of carrier records as required by 21 USCA 373.

21 USCA 331 (f) prohibits refusal to permit entry or inspection of a factory under 21 USCA 374.

21 USCA 333 (a) (Sect. 303 of the Food Act) punishes violation of any of the above sub-sections by not more than one year in prison and $1,000 fine.

Section 21 USCA 333 (b) punishes violation of any one of the above sub-sections with intent to defraud or mislead by more than three years imprisonment and not more than $10,000 fine.

21 USCA 333 (c) is an exception where the party acted in good faith and can give a guarantee.

The amendments protect against unlawful seizures in libel condemnations because if there was a condemnation there could also be criminal prosecutions under the above actions.

In re Andrews Tax Liability, 18 F. Supp. 804 at 807 (Md. D. C.) Judge Chestnut held the amendments were applicable in administrative proceedings where no criminal charge was pending and he said:

> "In my opinion the great principle of the Fourth Amendment can properly here be invoked by the representatives of the taxpayer. It is true that the procedure sought, testimony under oath with reference to the books and records is not literally a search and seizure proscribed by the Fourth Amendment but, as pointed out in the memorable opinion of Mr. Justice Brad-

ley in Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746, the history of the conditions from which the Amendment emerged shows that its principle transcends its mere literal expression. It is just as incumbent upon the courts now as in the past to vigilantly protect the citizen against unreasonable and oppressive inquisitorial investigations instituted and conducted without probable cause. Jones v. Securities Comm., 298 U. S. 1, 26, 56 S. Ct. 654, 662, 80 L. Ed. 1015. And it has recently been held in the Third Circuit that the Fourth Amendment is a protection to the individual taxpayer against cumulative investigations of his books and records in a situation similar to the instant case, so far as the year 1931 is concerned. Zimmerman v. Wilson, (C.C.A.) 81 F. (2d) 847. It is said for the Commissioner that the Fourth Amendment is applicable only to criminal prosecutions, which this case is not. Of course there are particular situations in civil cases where the amendment is not properly applicable, *but its protective principle is not limited to pending criminal proceedings.* Weeks v. United States, 232 U. S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652, L.R.A. 1515B 834, Ann. Cas. 1915 c. 1177; Federal Trade Comm. v. American Tobacco Co., 264 U. S. 298, 44 S. Ct. 336, 68 L. Ed. 696, 32 A.L.R. 786; Federal Trade Comm. v. Baltimore Grain Co., 284 F. 886 (D.C.Md.), affirmed 267 U. S. 586, 45 S. Ct. 461, 69 L. Ed. 800; Jones v. Securities Comm., 298 U. S. 1, 26, 56 S. Ct. 654, 662, 80 L. Ed. 1015; Harriman v. Interstate Commerce Commission, 211 U. S. 407, 29 S. Ct. 115, 53 L. Ed. 253; 370, 50 L. Ed. 652; *In re* Pacific Railway Comm., (C.C.) 32 F. 241, 250."

In U. S. vs. Grapefruit, 189 Fed. 331 at 333 (C.C.A.—2) the Court held and said:

"Noyes, Circuit Judge (after stating the facts as above). The different sections of the food and drug act while relating to different subjects are consistent and, in many respects, interdependent. The *second section*—the relevant portions of which have been shown—provides that any person *violating the provisions* of the act shall be guilty of a *misdemeanor* and

subject to *fine* and *imprisonment*. The *tenth section* provides that articles sold or transported in violation of the provisions of the act shall be *liable to seizure* and *condemnation*. Both sections relate to penalties for violations of the act. The penalty under the other section is the forfeiture of the misbranded or adulterated goods: *Both sections are penal in their nature. Punishment is as well inflicted by the forfeiture* and *loss of property as by a fine.* The two sections taken together (with the first section which relates to manufacture in territories) cover the subject of the punishment imposed for breaches of the provisions of the statute."

In U. S. Dotterwich, 320 U. S. 277; 88 L. Ed. 74, the Court held that officers as well as the corporations are liable to prosecution under the act, and says Act Section 201 (e) specifically defines "person" to include "corporation."

The amendments must be liberally construed to protect against prohibited searches. Also the statutes must be so construed as to preserve the constitutional rights.

Grau vs. U. S., 287 U. S. 124; 77 L. Ed. 212; Sgro vs. U. S., 287 U. S. 206 at 210; 77 L. Ed. 260 at 262.

They must be reasonably construed. Lepkowitz case.

The 5th Amendment applies and protects where papers are obtained by officers under color of office or implied promises of immunity. U. S. vs. Abrams, 230 Fed. 313 at 314 (D. C. Vt.) where the Court said:

"None of the papers were voluntarily delivered to the officers. They were all obtained by the promise or threat that it would be better for this defendant if he gave Mr. Chandler what he wanted. *This promise* of *threat influenced this defendant* to part with his papers, and *makes their delivery involuntary in the eye of the law.* Bram v. United States, 168 U. S. 532, at 542, 18 Sup. Ct. 183, 42 L. Ed. 568. The delivery of these

papers may well be likened to a confession, which is incompetent, because not voluntarily made. In Bram v. United States, *supra*, the court said at page 542 of 168 U. S. at page 187 of 18 Sup. Ct. (42 L. Ed. 568):

> 'In criminal trials, in the courts of the United States wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself."
>
> But a confession, in order to be admissible, must be free and voluntary, that is, must not be extracted by any sort of threats of violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence * * * a confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, and therefore excludes the declaration if any degree of influence has been exerted.'"

The opinion in the Bram case then discusses with approval the history of the amendment as set out in the Boyd case.

In Zimmermann v. Wilson, 105 F. (2d) 283 at 585 (C.C.A. 3) Judge Biddle (now Attorney General) for the Court said:

> "The Fourth Amendment protects against unreasonable searches; and 'the search is "unreasonable" only because it is out of proportion to the end sought'; McMann v. Securities and Exchange Comm. 2 Cir., 87 F. 2d 377, 379, 109 A.L.R. 1445 involving similar facts. Agents may not under official pretext but in fact officiously, extend their powers beyond those provided by the law. * * *" Newfield v. Ryan, 5, Cir., 91 F. 2d 700, 703, certiorari denied 302 U. S. 729, 58 S. Ct. 54, 82 L. Ed. 563, If they attempt to examine unrelated transactions, or to engage in an irrelevant 'fishing expedition', as the complainants suggest, they must be restrained by the court to whom application is made to enforce compliance."

In U. S. vs. Sam Chin, 24 F. Supp. 15 at 16 Judge Chestnut said:

> "The 4th Amendment is a fundamental constitutional bulwark which protects the individual against unlawful and *oppressive administrative* action in *unreasonable* searches and seizures of personal effects, and is to be liberally applied to promote the great objects which it was designed to accomplish, Byars v. United States, 273, U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520; United States v. Lefkowitz, 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877, 82 A.L.R. 775; Go-Bart Importing Co. v. United States, 282 U. S. 344, 356, 51 S. Ct. 153, 157, 75 L. Ed. 374. It has been given effect in this court in cases where the circumstances made it applicable. United States v. Goodhues, D. C. 53 F. 2d 696; United States v. Ruffner D. C. 51 F. 2d 579.

Agnello vs. U. S., 269 U. S. 20; 70 L Ed. 145 held that the search without warrant of the premises of one of several conspirators who violated the Antinarcotic Act, who have been placed under arrest at the residence of one of them, some distance from the place of search, violates the 4th Amendment to the Constitution. It also held that belief, however well-founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant.

In Weeks vs. U. S., 232 U S. 383; 58 L. Ed. 652 after defendant was arrested the marshal and police officers went to his residence, rapped on the door, were admitted by someone probably a boarder the Court says and the marshal took some letters belonging to the defendant and the Court held this was an illegal seizure in violation of the Constitution.

In Silverthorne Lumber Company vs. U. S., 251 U. S. 385, 64 Law Ed. 319 at 321, the Court said:

> "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its

right to avail itself of the knowledge obtained by the means *which otherwise it would not have had.*"

* * * * *

"In our opinion such is not the law. It reduces the 4th Amendment to a form of words, 232 U. S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it *shall not be used at all.* Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

* * * * *

"The principle applicable to the present case seems to us plain. It is stated satisfactorily in Flagg vs. United States, 147 C. C A. 367, 233 Fed. 481, 483."

* * * * *

"But the *rights* of a *corporation* against unlawful *search* and *seizure* are to be protected even if the same result might have been achieved in a lawful way."

Exploratory search of a business office is prohibited, Go.-Bart Importing Company or U. S. 282, U. S. 344 at 356; 75 Law ed. 374 at 382 where the Court held and said:

"There remains for consideration the question whether the search of the premises, the seizure of the papers therefrom and their retention for use as evidence may be sustained. The first clause of the 4th Amendment declares: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. It is general and forbids every search that is unreasonable; it *protects all those suspected or known* to be offenders as well as the *innocent*, and *unquestionably extends* to the premises where the search was made and the papers taken. Gouled v. United States 255 U. S. 298, 307, 65 L. ed. 647, 651, 41 S. Ct. 261. The second clause declares, "and no warrants shall issue but upon probable cause, supported by Oath or affirma-

tion, and particularly describing the place to be searched, and the persons or things to be seized." This *prevents the issue* of warrants on *loose, vague or doubtful bases* of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every state in the Union. Agnello vs. United States 269 U. S. 20, 33, 70 L. ed. 145, 149, 51 A. L. R. 409, 46 S. Ct. 4. The need of protection against them is attested alike by history and present conditions. *The Amendment is to be liberally construed* and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. Boyd vs. United States, 116 U. S. 616, 623, 29 L. ed. 746, 748, 6 S. Ct. 524; Weeks vs. United States, 232 U. S. 389-392, 58 L. ed. 654, 655, L. R. A. 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177, *Supra*. There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the officers saw conspiracy being committed. And there is no suggestion that Gowen or Bartels was committing crime when arrested."

* * * * *

"O'Brien falsely claimed to have a warrant for the search of the premises and he made the arrests under color of the invalid warrant. By *pretension* of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. *It was a lawless invasion* of the premises and a general exploratory search in the hope that evidence of crime might be found. Federal Trade Commission vs. American Tobacco Co. 264, U. S. 298, 306, 68 L. ed. 696, 700, 32 A. L. R. 780, 44 S. Ct. 336."

There were no facts known to the Government to justify the libels and seizure at the time of filing the libels and the seizure of goods and the libels thus can not be sustained.

In U. S. vs. Lefkowitz, 285 U. S. 452; 76 Law ed. 877 at page 879, 881, 883 the Court said:

"The allegations of the complaint show that the complaining witness had knowledge and information of facts amply sufficient to justify the accusation."

* * * * *

"In the Circuit Court of Appeals reversed 52 F. (2d) 52. It found that the search of the person of Lefkowitz was lawful and that the things taken might be used as evidence against him, held that the things seized when the office and furniture were explored did not belong to the same class, referred to "the firmly rooted proposition that what are called *general exploratory searches throughout premises and personal property are forbidden,*" and said that it did not matter 'whether the articles of personal property owned and the contents examined are numerous or few, the right of personal security, liberty and private property is violated if the search is general, for nothing specific, but for whatever the containers may hide from view and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light."

* * * * *

"In Entick v. Carrington, 19 How. St. Tr. 1029, Lord Damden declared that one's papers are his dearest property, showed that the law of England did not authorize a search of private papers to help forward conviction even in cases of most atrocious crime and said (p. 1073); 'whether this proceedeth from the gentleness of the law towards criminals, or from a consideration *that such a power would be more pernicious to the innocent than useful to the public,* I will not say. It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be *both cruel and unjust;* and it should seem, that *search for evidence is disallowed upon the same principle.* There too the innocent would be confounded with the guilty."

"The teachings of that great case were cherished by our statesmen when the Constitution was adopted. In

Boyd v. United States, *supra* (116 U. S. 630, 29 L. ed. 751, 6 S. Ct. 524), this Court said: "The principles laid down in this opinion (Entick v. Carrington) affect the very essence of constitutional liberty and security. They apply to all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of life. Any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or *to forfeit his goods* is within the condemnation of that judgment. In this regard the 4th and 5th Amendments run almost into each other." And this Court has always construed provisions of the Constitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used to not measure the purpose or scope of its provisions. M'Culloch v. Maryland, 4 Wheat. 316, 406, 407, 421, 4 L. ed. 579, 601, 602, 605; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 S. Ct. 524, *supra;* Byars v. United States, 273 U. S. 28 71 L. ed. 520, 47 S. Ct. 248, *ubi supra.*"

Nueslein v. District of Columbia, 73 App. D. C. 85 at 87; 115 F. (2d) 690, (quoted above p. 21) where defendant made a voluntary admission before he knew of any charge the Court said:

"A confession does not make good a search illegal at its inception, since an illegal search cannot be legalized by what it brings to light, and such rule should not be narrowed even though an admission or confession is obtained

Before a court will hold a defendant has waived his protection under Fourth Amendment, there must be *convincing evidence to that effect.*

The crucial thing 'found' in this 'search' was a declaration of fact by the defendant that has become decidedly incriminating. Yet the derivations of the IVth and Vth Amendments treat separate problems. The IVth secures one type of privacy; the Vth protects against testimonial compulsion. The constitutional protection afforded by these two Amendments and the rules of evidence travel by on different planes; The

Amendments are directed toward thwarting oppression by the Federal Government, and the rules of evidence, for the most part, toward the probabilities of truth."

* * * * *

"Under such an analysis it would seem that one should conclude that the defendant's voluntary statement to the officers that he was driving the taxicab at the time of the accident should be admitted."

* * * * *

"We conclude, nevertheless, that the officers' testimony *regarding the defendant's declaration is inadmissible.*"

* * * * *

"But how did the officers find themselves in position to see and hear the defendant? The officers, in the pursuance of a general investigation, entered the home *under no color of right.* They did not know that the defendant was driving the car; they did not know that any offense had been committed."

* * * * *

"*When the officers entered they were just investigating, when the defendant told them that he was driving* the cab at the time of the accident. The officers looking him over adjudged him to be drunk, and then, and not until then, two and two equaled a drunken driving charge—a charge which can be made without an accident, the only starting point for this investigation."

* * * * *

"The rights of the defendant under the IVth Amendment have been infringed, and he has not waived those rights. Before a court will hold that a defendant has *waived his* protection under this Amendment, *there must be convincing evidence to that effect.* The only evidence in this record that could be said to approach waiver is the voluntary statement by the defendant. But this statement is only a comment in respect to the accident. It has been held that a confession does not make good a search illegal at its inception."

* * * * *

"When two interests conflict, one must prevail. To us the interest of *privacy safeguarded* by the Amendment is *more important* than the interest of *punishing* of those *guilty* of misdemeanors."

* * * * *

"Even if the criminal and civil remedies worked, the protection would not be complete. The amendment does not outline the method by which the *protection* shall be afforded, but some effective method must be administered; the *protection granted by constitutional provisions* must *not* be *dealt* with as *abstractions.* A simple, effective way to assist in the realization of the security guaranteed by the IVth Amendment in this type of case is to dissolve the evidence that the officers obtained after entering and remaining illegally in the defendant's home."

"The IVth Amendment however was not written for felons alone. It not only includes misdemeanants, but also the *great bulk* of the *population*, the *innocent.*"

* * * * *

"Once it is realized that the common law rule, all competent evidence is admissible no matter how secured, is no longer the law when the IVth Amendment is infringed, this case presents one simple basic question: is it more important to effectuate the vital constitutional policy of security in the home from general investigations *directed toward the hope that some evidence will turn up,* or the policy that all misdemeanants be brought to task. We feel that the policy of making effective in concrete cases 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * * to be the more important'."

In Henderson vs. U. S., 12 F. (2d) 528, 531 (CCA-4 Parker, Waddill and Rose, J. J.) the court held that where government agents, after informers had purchased cocaine of defendant, entered store, part of which was used as dwelling, demanded right to make search, and on being refused permission, arrested defendant without warrant and then made search, finding cocaine and marked money in bedroom, *held arrest was not primary purpose of officers,* and search could not be held reasonable as incidental to lawful arrest.

And Judge Parker said:

"And to paraphrase language of Mr. Justice Clarke, the rights guaranteed by the Fourth Amendment are *not to be thus encroached upon or gradually depreciated* by imperceptible practice of courts or by well intentioned but *mistakenly over-zealous executive officers.*"

In one of the decisions it is stated:

"This is a part of a broader rule that an illegal search can not be legalized by what it brings to light. Byars vs. U. S. 71 L. ed. 520; Henderson vs. U. S., 12 F. (2d) 528 (CCA-4) 51 ALR."

Conclusion.

On consideration of the foregoing authorities, it is clear that the judgment appealed from should be affirmed.

It should be affirmed on the ground that the Court based it on and also on the ground that the 4th Amendment of the Constitution is applicable in this instant.

Respectfully submitted,

RAYMOND M. HUDSON,
J. CHARLES FAGAN,
Attorneys for the Claimant-Appellee.

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